



## **NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES**

### **National Endowment for the Humanities**

#### **45 CFR Part 1173**

#### **RIN 3136-AA45**

### **Indemnification of Employees**

**AGENCY:** National Endowment for the Humanities, National Foundation on the Arts and the Humanities.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The National Endowment for the Humanities (NEH) is proposing to publish a policy that permits indemnification of NEH employees in appropriate circumstances, as determined by the Chairperson of NEH or the Chairperson's designee, for claims made against NEH employees as a result of actions taken by them in the scope of their employment.

**DATES:** Send comments on or before [INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** You may send comments by email to [gencounsel@neh.gov](mailto:gencounsel@neh.gov).

*Instructions:* Include "3136-AA44" in the subject line of the email.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Voyatzis, Deputy General Counsel, Office of the General Counsel, National Endowment for the Humanities, 400 7th Street, SW, Room 4060, Washington, DC 20506; (202) 606-8322; [gencounsel@neh.gov](mailto:gencounsel@neh.gov).

### **SUPPLEMENTARY INFORMATION:**

#### **Background**

The Federal courts have upheld the authority of a Federal agency to establish procedures governing the production of records and testimony by personnel in legal proceedings in which the agency is not a party. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). This proposed rule would establish policies and procedures that the agency will follow when, in a

legal proceeding, a current or former NEH employee receives a demand or request to testify as to facts or events that relate to his or her official duties or the functions of NEH or to produce official records and information.

This proposed rule relates to testimony and the production of records only in connection with legal proceedings to which the United States is not a party. It would not apply to requests under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act of 1974, 5 U.S.C. 552a; Congressional demands or requests for testimony or records; or legal proceedings to which the United States is a party.

### **Request for Comments**

NEH requests comments, which NEH must receive at the above address, by the above date.

### **Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review**

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget for review.

### **Executive Order 13132, Federalism**

This rulemaking does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

### **Executive Order 12988, Civil Justice Reform**

This rulemaking meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988. Specifically, this rulemaking is written in clear language designed to help reduce litigation.

### **Executive Order 13175, Indian Tribal Governments**

Under the criteria in Executive Order 13175, NEH evaluated this rulemaking and determined that it will not have any potential effects on Federally recognized Indian Tribes.

### **Executive Order 12630, Takings**

Under the criteria in Executive Order 12630, this rulemaking does not have significant takings implications. Therefore, a takings implication assessment is not required.

### **Regulatory Flexibility Act of 1980**

This rulemaking will not have a significant adverse impact on a substantial number of small entities, including small businesses, small governmental jurisdictions, or certain small not-for-profit organizations.

### **Paperwork Reduction Act of 1995**

This rulemaking does not impose an information collection burden under the Paperwork Reduction Act. This action contains no provisions constituting a collection of information pursuant to the Paperwork Reduction Act.

### **Unfunded Mandates Reform Act of 1995**

This rulemaking does not contain a Federal mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year.

### **National Environmental Policy Act of 1969**

This rulemaking will not have a significant effect on the human environment.

### **Small Business Regulatory Enforcement Fairness Act of 1996**

This rulemaking will not be a major rule as defined in section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rulemaking will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

### **E-Government Act of 2002**

All information about NEH required to be published in the *Federal Register* may be accessed at [www.neh.gov](http://www.neh.gov). The website [www.regulations.gov](http://www.regulations.gov) contains electronic dockets for NEH's rulemakings under the Administrative Procedure Act of 1946.

### **Plain Writing Act of 2010**

To ensure this proposed rule speaks in plain and clear language so that the public can use and understand it, NEH modeled the language of the proposed rule on the Federal Plain Language Guidelines.

### **List of Subjects in 45 CFR Part 1173**

Administrative practice and procedure.

For the reasons set forth in the preamble, the National Endowment for the Humanities proposes to amend 45 CFR chapter XI by adding part 1173, consisting of §§ 1173.1 and 1173.2, to read as follows:

## **PART 1173—INDEMNIFICATION OF EMPLOYEES**

Authority: 5 U.S.C. 301.

### **§ 1173.1 Policy on employee indemnification.**

(a) This part explains when the National Endowment for the Humanities (NEH) will indemnify you, an employee or a former employee of NEH, against a verdict, judgment, or other monetary award that a court or other competent authority renders against you. When NEH indemnifies you against a verdict, judgment, or other monetary award, it means that NEH will pay the amounts that the court orders you to pay.

(b) This part also explains when NEH will settle a claim (also referred to as compromising a claim) that someone brings or threatens to bring against you in court or before another competent authority. It is only in exceptional circumstances that NEH will agree to settle a claim before a court or other competent authority has entered a verdict, judgment, or monetary award against you.

(c) In order for NEH to indemnify you or settle a claim:

(1) The verdict, judgment, or monetary award to be paid or the claim to be settled must relate to something that you did (or failed to do) within the scope of your employment with NEH; and

(2) The Chairperson of NEH or someone the Chairperson designates (the Agency Official) must determine, as a matter of discretion, that indemnifying you or settling the claim would be in the interest of NEH.

(d) If you become aware that someone has made or may make a claim against you personally as a result of something that you did (or failed to do) within the scope of your employment, you must immediately notify the Office of the General Counsel.

(e) To request that NEH indemnify you or settle a claim against you, you must submit a written request to the Office of the General Counsel. You must include a copy of the verdict, judgment, monetary award, or settlement proposal, as appropriate. The Office of the General Counsel may consult about the matter with your supervisor, other agency employees, and the Department of Justice.

(f) The Agency Official may waive the requirements of paragraphs (d) and (e) of this section if it would be in the interest of NEH to do so.

(g) If the Agency Official determines that NEH will indemnify you or settle a claim on your behalf, NEH's commitment will be subject to the availability of appropriated funds. The Agency Official may impose other conditions or limitations on the determination at his or her discretion.

(h) If the Chairperson requests indemnification or settlement of a claim, the General Counsel will perform the functions assigned to the Chairperson under this section with respect to that request.

#### **§ 1173.2 [Reserved]**

Dated: December 15, 2021.

Samuel Roth,

Attorney-Advisor, National Endowment for the Humanities.

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